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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 96

V. W. PETTY ..... *Petitioner*

v.

MISSOURI AND ARKANSAS RAILWAY COMPANY..... *Respondent*

REPLY BRIEF FOR PETITIONER

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PARAGON PRINTING CO., LITTLE ROCK

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At the outset, and in order to avoid any possible confusion to the Court which might otherwise result, petitioner deems it advisable to direct the Court's attention to, and correct, the erroneous designation in respondent's brief of Major W. S. Walker and Mr. Virgil D. Willis as "Counsel for Petitioner," which appears both on the cover of respondent's brief and at page 9 thereof, and which should be amended to read "Counsel for Respondent."

Certain fallacious arguments and erroneous statements appear in respondent's brief, which petitioner feels should not go unanswered. They are:

First: That a federal question was raised by petitioner for the first time in his motion for rehearing.

The answer to this erroneous statement is apparent in the opinion of the Supreme Court of Arkansas, for that opinion specifically refers to the federal question urged by petitioner on appeal; proceeds to discuss the question, and decides it adversely to petitioner.

The Supreme Court of the United States, in the case of *Cissna* v. *Tennessee*, 246 U. S. 289, said:

> "But if the supreme court of the state treated Federal questions as necessarily involved, and decided them adversely to plaintiff in error, and could not otherwise have reached the result that it did, it becomes immaterial to consider how they were raised."

Second: Respondent, on page 5 of its brief, alludes to the decision of this Court in the case of *Erie Ry. Co.* v. *Tompkins*, 304 U.S. 64. In so doing, respondent labors under a very serious misapprehension as to the application of the doctrine announced therein. In the opinion in that case, it was said (p. 78):

> "*Third*: Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state."

The *Erie* case, in short, makes it obligatory upon *federal courts* to apply state laws in matters *not governed* by the Federal Constitution or by acts of Congress; but it does not in any sense prohibit the federal courts from exercising an independent judgment in their application

of positive federal law. In the application of federal law, on the other hand, state courts are not free to apply a local common law rule in their construction of a federal statute, where such rule is contrary to the federal courts' previous construction of that statute.

> "The States cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land."
>
> *Kalb* v. *Feuerstein*, 308 U.S. 433.

In the case at bar, petitioner urged the Railway Labor Act as controlling. The Supreme Court of Arkansas, in passing upon this point, said:

> "While this act does not prescribe an exclusive remedy and appellant was not obliged to present his claim to Division No. 1 of said Board (National Railway Adjustment Board) . . . . yet that procedure was open to him. Instead of presenting his claim to that tribunal, he elected to bring his action in this state, where the decision of this court in the Matthews case prevented his recovery" (R. 10).

Subdivision 2, 45 U.S.C., section 152 (Railway Labor Act) reads:

> "All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

The breach sued on by petitioner was the failure and refusal by respondent to accord the hearing provided for in the employment agreement. The stipulation against

wrongful discharge without a hearing, contained in the agreement, was in substantial conformity with the section of the Statute quoted above, and its breach was in violation of the positive duty imposed by the Act. The obligation to accord the hearing does not, therefore, depend for its enforceability upon any consideration moving from petitioner; it is, on the contrary, an obligation created by federal statute, and the common law rule of contracts, with regard to mutuality of obligation, is thereby superseded to that extent.

Respondent, on pages 4 and 5 of its brief, quotes from the opinion of the Circuit Court of Appeals, Fifth Circuit, in the case of *Illinois Cent. R. Co.* v. *Moore*, 112 F. (2d) 959; which case petitioner also cites in his brief at page 21. Respondent, however, insists upon relying on the precise point in that case which was the basis for its subsequent reversal by this Court (*Moore* v. *Illinois Cent. R. Co.*, 312 U.S. 630). Both the Circuit Court of Appeals and the United States District Court (*Moore* v. *Illinois Cent. R. Co.*, 24 F. Supp. 731) concurred, nevertheless, in holding that the stipulation against discharge without a hearing was valid and enforceable; the Circuit Court of Appeals saying:

> "The provision in the collective agreement for a hearing before the carrier's officers, with appeal to the highest, *is in line with the requirements of the statute* . . . ." (Italics supplied).

Upon that point, that court was construing the effect of a contract under a federal statute, and, in so holding, was not in conflict with the doctrine of the *Erie* case. On the contrary, the Supreme Court of Arkansas was obliged, in the case at bar, to follow the federal courts' holding in that respect.

Third: Respondent urges, in the alternative, that this Court find in its favor on the question of limitations, which was the second ground raised in its demurrer (R. 3, 4).

The Arkansas statutes of limitations with respect to contracts are as follows:

> "The following actions shall be commenced within three years after the cause of action shall accrue, and not after:
>
> "*First.* All actions founded upon any contract or liability, expressed or implied, not in writing (a) . . . . ."
>
> *Pope's Digest of the Statutes of Arkansas*, Sec. 8928.

> "Actions on promissory notes, and other instruments in writing, not under seal, shall be commenced within five years after the cause of action shall accrue, and not afterward."
>
> *Ibid.*, Sec. 8933.

In support of its contention, respondent, on page 7 of its brief, states:

> "The Supreme Court of Arkansas said it pretermitted a *decision* of the question of the application of the statute of limitations which was specifically pleaded by defendant in the court below" (Italics ours.)

As a matter of fact, respondent has indulged in a subtle, but nonetheless prejudicial, misstatement of the language of that court's opinion. The majority opinion states, not that it pretermitted a *decision* of that question, but that it would pretermit a *discussion* of it (R. 7). There

is a substantial difference between the decision of a point and a mere discussion of it. It is quite evident that the question of limitation, raised by respondent's demurrer, was considered at some length by the court, and rejected by the majority. This is reflected by the fact that the Chief Justice concurred in the *result*, but upon the ground that the three-year statute of limitations applied (R. 11). Mr. Justice Carter also concurred and, while his written concurring opinion does not appear in the record in this case, it is reported in full in *Petty* v. *Missouri & Arkansas Ry. Co.*, 167 S.W. (2d) 895. His concurrence in the result is also based upon the three-year statute of limitations.

It should not be overlooked that the question of limitations in this case was raised by demurrer, and the rule in Arkansas is that, in an action at law, the defense of limitations cannot be raised by demurrer unless the complaint not only shows that the time in which to bring the action has elapsed, but that the special things which take it out of the statute do not exist.

Central Clay Drainage Dist. v. *Hunter*, 174 Ark. 293;

McCollum v. *Niemeyer*, 142 Ark. 471;

Berg v. *Johnson*, 139 Ark. 243;

Rogers v. *Ogburn*, 116 Ark. 233.

It is also the rule in Arkansas that a demurrer to a complaint admits the truth of the allegations *and all reasonable inferences which can be drawn therefrom.*

Herndon v. *Gregory*, 190 Ark. 702;

Watson v. *Poindexter*, 176 Ark. 1065;

Brown v. *Arkansas Central Power Co.*, 174 Ark. 177;

Life & Casualty Co. v. *Ford*, 172 Ark. 1098.

As to the reasonable inferences to be drawn from petitioner's complaint: it is alleged therein that the employment agreement relied upon by petitioner was "*entitled* 'Missouri & Arkansas Railway Company Schedule of Rules, rates of pay and Working Conditions to Engineers, Firemen and Hostlers'." It is also alleged that certain sections "of Article 32 of said agreement are as follows, to-wit:" setting forth, *verbatim*, the sections involved, and enclosing the same in quotation marks (R. 2). From the use of the word "entitled" and the employment of quotation marks in setting out, *verbatim*, the specific sections of the contract relied upon, the logical and reasonable inference to be drawn is that petitioner was pleading a written contract; which reasonable inference is admitted by the demurrer.

In 37 Corpus Juris, section 713 (page 1211) it is said:

> "Where a complaint, for a breach of contract, does not show that the contract was in writing, it will be presumed upon a demurrer raising the statute of limitations that the contract was in writing, when the statutory period for such contracts has not yet run."

The complaint in this case alleges that petitioner was discharged by respondent on December 3, 1935 (R. 1, 2), and that suit was first filed in Boone County Circuit Court on December 3, 1940 (R. 3).

The Arkansas rule for computing time in the application of statutes of limitations is laid down in the case of *Peay* v. *Pulaski County*, 104 Ark. 641, as follows:

> "The rule for computing time in statutes of limitations in this state is to exclude the first day and include the last day."

And, in *Massachusetts Bonding & Ins. Co.* v. *Home Life & Acc. Co.*, 119 Ark. 102, it is again stated:

> "That is to say, the general rule is that, in computing the time, the first day is to be excluded and the last day is to be included . . . We have followed this general rule in the case of taking appeals and in construing the staute of limitations."

Petitioner's cause of action having accrued on December 3, 1935, and suit filed on December 3, 1940, the bar of the five-year statute of limitations had not, under the rule above stated, intervened.

It is respectfully submitted that the petition for certiorari should be granted.

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